Before making any such order the Court would probably take into consideration the provisions of section 17 of the Pensions Ordinance. If any former Government officer goes bankrupt after he is in receipt of his pension that section creates procedure by which the Government can in effect allow the pensioner to enjoy his pension without any part of it reaching his creditors through the Official Assignee. The section does not, however, create analogous procedure when the officer has become bankrupt before the time arrives at which a pension may be awarded to him. On the other hand the facilities afforded to Government officers to capitalise a part of their pension is, I suppose, intended to allow or assist them on retirement to purchase or construct some residence or to buy or establish some business or undertaking or to pay some other capital sum which will lessen proportionately their future living expenses. If, instead of doing this, the bankrupt is ready to dissipate this gratuity in less worthy ways I see no inherent reason why the Court should not rather order that the whole or part of it should be paid to the Official Assignee.

I think the Official Assignee certainly has a discretion as to whether he should or should not apply to the Court under section 55(3) of the Bankruptcy Ordinance but, without wishing to limit a discretion which it is his to exercise, I think it would be wise for him to make such an application in most cases and especially where a lump-sum gratuity is to be paid to the bankrupt; or to ascertain the wishes of the creditors, under section 83(2) as to whether he should do so. If the Official Assignee does not take such action it may be said that he is in effect taking it upon himself to decide something which it should be for the Court to decide. If he does make an application to the Court it will always be open to the bankrupt to establish by affidavit (supported perhaps by a formal undertaking to the Court) that the lump-sum will be expended in a manner necessary to enable him to spend his retirement free from actual want.

If the Official Assignee does not make any application and the creditors think that he ought to do so, their proper remedy would seem to be to take action under section 83, 84 or 85 of the Bankruptcy Ordinance.

I think that in this case the procedure adopted by the petitioning creditor is misconceived and I therefore make no order on the motion presented on her behalf.

These proceedings being, I am informed, in the nature of a test case, the Official Assignee has, however, taken the precaution of also placing on the file a formal application for an order under section 55(3) of the Bankruptcy Ordinance together with an affidavit by the bankrupt in which the bankrupt appears frankly to disclose that the lump-sum gratuity of $1,780 has been expended by him in paying off certain debts (possibly created since his bankruptcy) in preference to those due under his bankruptcy.

In these circumstances I think the application filed by the Official Assignee should be proceeded with and should be heard and decided on its merits.

*Order accordingly.*

Solicitors: *John G. Campbell & Co.*

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[157] F.M.S. REPORTS [157]

## RAJA SINGH v. CHIN FATT

**[A.C.J. (Aitken J.) January 22, 1936]**

**[Negri Sembilan Magistrate's Civil Appeal No. 21 of 1935]**

*Action for damages — Negligent driving of a motor vehicle — Retention of control by the owner — Onus of proof — Misdirection by Judge or Magistrate.*

Where the owner of a motor vehicle has handed over both actual possession and right of control to another person that person and not the owner is liable for any damage caused by his negligent driving.

If a Judge or Magistrate misdirects himself as to the onus of proof and places it on *A.* when it should have been on *B.*, then if he gives judgment in favour of *B.*, *A.* is entitled to a new trial unless the Appeal Court can be perfectly sure that the trial Judge or Magistrate must have come to the same conclusion of fact even had he directed himself aright as to the burden of proof.

*K. K. Benjamin* for the appellant.

*E. Jeff* for the respondent.

The facts appear sufficiently from the judgment.

*Cur. Adv. Vult.*

**Aitken J.:** At some time in the forenoon of the 11th of July, 1935, — apparently about 9 o'clock — the defendant's motor lorry collided with the plaintiff's motor car. Both vehicles were damaged as a result of the collision, but the damage done to the car was more extensive than that done to the lorry. At the time of the accident the defendant's lorry was being driven by a certain Chin Hon, and there can be no doubt that the collision was due to his negligent driving. The defendant, however, denied liability, and the plaintiff brought an action against him in the Court of the Magistrate at Seremban claiming damages not exceeding $500 and costs. Paragraph 2 of the plaintiff's amended statement of plaint reads as follows:—

> "2. On the 11th day of July, 1935, at about the 2¾ mile on the road between Seremban to Labu, the defendant's servant or servants negligently drove the said motor lorry on to and against the plaintiff's said motor car causing it serious injury, whereby the plaintiff has suffered damage."

The defendant met this paragraph by denying "each and every allegation contained in paragraph 2 of the plaint, except that there was a collision." In my opinion this denial was not sufficiently specific, and did not clearly raise an issue as to whether or not Chin Hon was the defendant's servant. It might very well be read as denying the negligence alleged, the injury alleged, the damage alleged, and nothing more, and it was so read by learned counsel for the plaintiff. When the case came on for trial before the learned Magistrate on the 5th of September, 1935, Mr. Cross proposed that evidence should first of all be led regarding "the responsibility for the accident." Then, if the Court found in his favour on that issue, he would lead evidence as to the measure of damages. To this Mr. Jeff agreed, and Mr. Cross proceeded to lead evidence proving, quite conclusively, that the collision was due to the negligent driving of the defendant's lorry by Chin Hon. At the close of this evidence, which was not seriously challenged by cross-examination, Mr. Jeff submitted that as the defendant himself was not on the lorry at the time of the collision, and as the plaintiff had adduced no evidence to show that Chin Hon, the driver of the lorry, was the defendant's servant or agent, the defendant was entitled to judgment. To

this argument Mr. Cross replied that the defendant had admitted his ownership of the lorry, and had not specifically denied that Chin Hon was his servant. Thereupon, in spite of Mr. Jeff's claim that section 109 of the Evidence Ordinance rendered the somewhat vague and ambiguous general denial to which I have already referred sufficient for the purposes of his submission, the learned Magistrate adjourned the case for evidence to be led as to the "relationship between Chin Hon and the defendant." In doing so I think the learned Magistrate was right for two reasons. The first is the defendant's failure to raise clearly the issue that Chin Hon was not his servant or agent, and section 109 of Evidence Ordinance cannot cure that omission. The second is the presumption that the driver of the motor lorry was the defendant's servant, which arose as soon as the defendant admitted that the lorry was his. This presumption rests on the grounds of common sense, general experience and convenience, but if authority for it is required such authority will be found in the English Divisional Court decision in *Barnard* v. *Sully,* 47 T.L.R. 557. The first of these reasons was almost certainly present in the learned Magistrate's mind, but the second one does not seem to have occurred to him or either learned counsel appearing before him. This presumption of which I have spoken can, of course, be rebutted by satisfactory evidence to the contrary, but in my opinion it does serve to fix the defendant with responsibility in default of any evidence to the contrary. Unfortunately no one seems to have appreciated this position when the case came on again before the learned Magistrate, and so far as I can gather from the record it proceeded on the footing that the admission that the lorry [158] belonged to the defendant [158] raised no presumption whatsoever as to Chin Hon being the defendant's servant or agent. Be that as it may, however, the learned Magistrate certainly devoted both time and trouble to the trial of that issue and in his judgment, after contrasting the evidence for and against, he ends up — "on the evidence I found as a fact that Chin Hon was not the agent or servant of the defendant at the time of the collision and I accordingly dismissed the suit with costs."

Now Mr. Benjamin, in his able and interesting argument, attacked this judgment on the following four grounds:—

1. That it was against the evidence which, if properly weighed and appreciated, clearly showed that Chin Hon was the servant of Chin Fatt at the time of the collision.

2. That, even if Chin Hon was not the servant of Chin Fatt, nevertheless the latter, because his usual driver Lam Koi Siew was accompanying Chin Hon at the time of the accident, was liable to the plaintiff on the authority of *Reichardt* v. *Shard,* 31 T.L.R. 24.

3. That, even if Chin Hon was not the servant of Chin Fatt and the presence of Lam Koi Siew on the lorry at the time of the accident made no difference, nevertheless Chin Fatt was liable to the plaintiff on the authority of the decision of the English Court of Appeal in *Parker* v. *Miller,* 42 T.L.R. 408.

4. That, even if grounds 1, 2 and 3 were decided against him, the learned Magistrate having wrongly placed the onus of proof as to the issue whether Chin Hon was or was not the servant of Chin Fatt on the plaintiff, the judgment of the learned Magistrate should be set aside and a new hearing ordered.

Mr. Jeff, for the defendant, rose to the occasion with an equally able and interesting argument, and I can claim to have devoted much time and thought to the solution of the difficult problems raised by this appeal. I will deal with Mr. Benjamin's grounds in their numerical order.

First, as to ground 1, it would be unprofitable to go into details. Let it suffice for me to say that I have gone carefully through all the evidence adduced in this case several times and considered it in the light afforded by Mr. Benjamin's criticisms. In the result I have come to two quite definite conclusions:—

(a) That there is ample evidence to support the learned Magistrate's finding of fact that Chin Hon was not Chin Fatt's servant, and

(b) That if Chin Fatt's account of his motor lorry expenses was genuine — and the learned Magistrate appears to have accepted it as such, then that alone was almost conclusive in favour of the contention that Chin Hon was not the servant of Chin Fatt.

Next comes ground 2, and in *Reichardt* v. *Shard, supra,* it was held that when a young man took out his father's car, which his father allowed him to do, the father was liable for an accident caused by his son's negligent driving because he always insisted on his chauffeur accompanying his son, and that was tantamount to an exercise of control. In this case it is common ground that the defendant's regular driver, Lam Koi Siew was in the lorry at the time of the accident, but there the analogy ends. According to the evidence Lam Koi Siew's presence was due to Chin Hon's request for an "attendant," and not to any insistence on the part of the defendant. Moreover Lam Koi Siew travelled in the back of the lorry where he could not really exercise any control over Chin Hon in the driver's seat. I am not prepared to hold that the mere presence of an owner's driver somewhere on a lorry is sufficient to render the owner liable for the negligent driving of a friend to whom he has lent the lorry. If in fact it had been proved that the defendant in this case insisted on his regular driver accompanying Chin Hon, then I should have regarded *Reichardt* v. *Shard, supra,* as directly in point. Unfortunately for Mr. Benjamin there is no evidence on the record to support such a view of the facts.

We come to ground 3, and Mr. Benjamin relied on *Parker* v. *Miller, supra,* as supporting his contention that the mere loan of a motor vehicle to a friend is sufficient to render the owner liable for any accident due to the borrower's negligent use of the vehicle. If that is so then the presence or absence of evidence as to agency can make no difference, and *Parker* v. *Miller, supra,* has become a star amongst the great company of leading cases. The facts were that Miller frequently allowed Lappin to drive his car. On one occasion Miller got out of his car and left Lappin to drive it to Lappin's house, which he did. There the car was negligently left by Lappin on a steep slope, and it ran down the slope and did damage and for this it was held in the County Court that Miller was liable. The Divisional Court took the view that the County Court Judge had not sufficiently directed his mind to the question of the relationship of principal and agent, and ordered a new trial. The Court of Appeal, however, reversed this decision and restored the judgment of the County Court Judge.

I have four observations to make on this case. In [159] the first place it has evoked considerable [159] adverse criticism amongst the very able gentlemen who deal with the subject of motor vehicle accidents in current legal literature in England. In the second place I am not bound by any decision of the English Appeal Court although, of course, every such decision is entitled to my profound respect. In the third place I have come to the conclusion that it should be confined strictly to its own special facts until the position is further elucidated by decisions of the same or a superior Court. And in the fourth place it seems to me that *Parker* v. *Miller, supra,* by which I am not bound, is at variance with the Privy Council case of *Samson* v. *Aitchison,* by which I am bound. In the latter case the judgment of their Lordships was delivered by Lord Atkinson, who stated :—

"The learned Judge in the course of his judgment laid down the law upon this question, the only question now for decision, with, as it appears to their Lordships, perfect accuracy, in the following passage: 'I think that where the owner of an equipage, whether a carriage and horses or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of his right, or is shewn by conclusive evidence to have in some way abandoned his right. If any injury happen to the equipage while it is being driven, the owner is the sufferer. In order to protect his own property if, in his opinion, the necessity arises, he must be able to say to the driver 'Do this,' or 'Don't do that.' The driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or the steering wheel. The owner, indeed, has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally: *Du Cros* v. *Lambourne,* [1907] 1 K.B. 40. The duty to control postulates the existence of the right to control. No doubt if the actual possession of the equipage has been given by the owner to a third person — that is to say, if there has been a bailment by the owner to a third person — the owner has given up his right of control."

Surely it is clear from Williams J.'s statement of the law, which was accorded the high testimonial of "perfect accuracy," that their Lordships of the Privy Council considered that where the owner of a motor vehicle has handed over both actual possession and right of control to another, that other and not the owner would be liable if an accident occurred through the other's negligent driving. At any rate that is my present view of their Lordships' judgment in *Samson* v. *Aitchison, supra,* and the fact that the English Court of Appeal in *Parker* v. *Miller, supra,* is said to have "proceeded on" *Samson* v. *Aitchison, supra,* cannot alter the clear and "perfectly accurate" statement of law I have just quoted. In rejecting Mr. Benjamin's argument on *Parker* v. *Miller, supra,* I am simply following that statement.

Lastly, we come to ground 4, and on this ground the argument revolved around the case of *Official Assignee of the Estate of Cheah Soo Tuan* v. *Khoo Saw Cheow,* [1937] App. Cas. 67, which I cited to counsel and in which Lord Tomlin stated :—

"The fact that the wrong party was called upon to begin, taken alone, might not be sufficient ground for a new trial. Here, however, there was more. The trial Judge had taken an erroneous view as to the law in regard to onus. His mind was coloured by that view, and he was thereby disabled from weighing evenly the evidence. Thus the respondent was placed at a disadvantage as the direct result of the trial Judge's error."

From this case I gather that if a Judge (or Magistrate) misdirects himself as to the onus of proof and places it on *A.* when it should have been on *B.*, then, if he gives judgment in favour of *B.*, *A.* is entitled to a new trial unless the Appeal Court can be perfectly sure that the trial Judge (or Magistrate) must have come to the same conclusion of fact even had he directed himself aright as to the burden of proof. I confess that I have experienced some little doubt and hesitation before arriving at the conclusion that there is a real and substantial difference between this case and the one now before me on appeal. In the latter case the learned Magistrate has not really misdirected himself as to the burden of proof, it undoubtedly rested on the plaintiff. All that he can be said to have done is to have failed to appreciate that proof of ownership of a motor vehicle is some evidence to show that the person driving it is the servant or agent of the owner. On a careful consideration of the whole proceedings, including the learned Magistrate's judgment, it seems to me quite impossible to say that his failure in that respect "coloured his whole outlook as to the facts and substantially prejudiced the plaintiff's chances." On the issue as to whether Chin Hon was the defendant's servant or agent the learned Magistrate carefully weighed the evidence for and against, and came to a clear [160] and definite conclusion that Chin Hon [160] was not such a servant or agent. I can see no reason whatever to doubt that he would have arrived at the same conclusion even if he had appreciated the presumption which arose from the mere proof of ownership of the motor vehicle.

For these reasons, which I have set out at considerable length, I must dismiss this appeal. However, since I am of opinion the defendant's failure to raise the issue of agency clearly and definitely in his pleading has considerably increased the length and costliness of these proceedings, he will be allowed only half his costs in this Court.

*Appeal dismissed.*

## JOHORE REPORTS

## RAMAN CHETTIAR v. TEO GEE & ANOR. VINAITHEETHAN CHETTIAR v. TAN KIAN

**[O.C.J. (Thorne J.) April 20, 1934]**

**[Muar Originating Summons No. 3 of 1934]**

*Land — Attachment of — Caveat — Unregistered agreement for lease — Johore Land Enactment, s.50.*

Lands held under Entry in the Mukim Register were attached in execution of a judgment obtained by a chetty against the registered proprietor thereof, subject to caveats being entered by persons who claimed to be lessees of the lands by virtue of agreements for leases dated prior to the chetty's judgment. The agreements were not registered. In an application by the chetty that the caveators be called upon to shew cause why the caveats should not be withdrawn:—

**Held:** that the attaching creditor was entitled to call in question the registration of the caveats.

An attaching creditor is, on the registration of a prohibitory order against land, a person claiming land within section 50(iv) of the Johore Land Enactment.